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NO. 90-769

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LOUISE H. RENNE, et al.,

Petitioners

vs.

BOB GEARY, et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION AND SUMMARY OF ARGUMENT

The instant Petition for Writ of Certiorari is an egregious trespass upon the time and resources of this Court and opposing parties and counsel.

Petitioners seek review of a Court of Appeals decision invalidating a ban on endorsements by political parties, even though prior decisions of this Court and the lower courts are uniform in

holding such endorsement bans to be inconsistent with the First Amendment.

Review in this Court is sought even though petitioners adduced no evidence whatsoever below to support any claim that the challenged endorsement ban is necessary to support any compelling state interest.

Finally, the Petition is based largely on claims to the effect that the tremendous abridgement of First Amendment rights wrought by California's endorsement ban can be sustained as a measure relating to the structure of local government, or by analogy to this Court's decisions upholding restrictions on corporate political spending and the Hatch Act - arguments which run directly counter to settled decisional law.

There is no basis for this Court to review the well-reasoned opinion of the Court of Appeals in this case.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH UNANIMOUS AUTHORITY INVALIDATING BANS ON PARTY ENDORSEMENTS

By invalidating California's absolute ban on all political party endorsements of candidates running for local school and judicial office, the Court of Appeals reached a conclusion in harmony with every other reported decision to consider the same question.

The authorities are unanimous: All political party endorsement bans have been invalidated as inconsistent with the First and Fourteenth Amendments. See Eu v. Democratic Committee (1988) 489 U.S. 214 , aff'ing (9th Cir. 1987) 826 F.2d 814 (invalidating California law which barred pre-primary endorsements by political parties); Abrams v. Reno (S.D. Fla 1978) 452 F.Supp. 1166, aff'd (5th Cir. 1981) 649 F.2d 342 (invalidating ban on political party endorsements in primary elections); Concerned Democrats v. Peno (S.D. Fla. 1978) 458 F.Supp. 60 (invalidating ban on political party endorsements in judicial races).

No conflict in authorities warranting review

exists in this case.

II. NO HISTORICAL OR OTHER EVIDENCE EXISTS IN THIS CASE TO SUPPORT ANY ARGUMENT THAT THE CHALLENGED ENDORSEMENT BAN IS NECESSARY TO SUPPORT ANY COMPELLING STATE INTEREST

Petitioners inaccurately suggest that California's ban on political party endorsements dates back to Hiram Johnson and the Progressive Era.

Such is not the case.

While California did eliminate party nominations for local school, and judicial offices as of 1913, no prohibition on party endorsements of candidates for such offices existed prior to 1986! See Unger v. Superior Court (1984) 37 Cal.3d 612, 615-618.

During the intervening 73 years, it was "customary for the governing bodies of political parties to endorse or support candidates for non-partisan office." Unger, supra, at p. 616, emphasis added.

While petitioner suggests that the contrary is true, the record is devoid of any evidence that party endorsements led to corruption or any other ill effect claimed by petitioner on even one occasion during said 73 year period.

These points are forcefully stated in the opinion below. Geary v. Renne (9th Cir. 1990) 895 F.2d 1230 (Petitioner's Appendix A).

> We . . . reject appellants' assertion that allowing party endorsements will lead inexorably to party usurpation of the nomination process for nonpartisan candidates; the seventy years of nonpartisan government celebrated by appellants were achieved without the benefit of a formal ban on partisan advocacy, and the State has offered nothing but speculative evidence to support its contention that the invalidation of §6(b) will generate a disastrous departure from the experience of the past.

Geary, supra, Pet. App. A, pp. 8-9., footnote omitted.

> The affidavits by various state officials offered in evidence by appellants fail to demonstrate that "the relative voice of /political parties/ has been overwhelming or even significant In influencing" nonpartisan elections, "or that there has been any threat to the confidence of the citizenry" in its nonpartisan officeholders. . . .

Id., at A-9, fn. 5.

> The dissent's description of California's populist reforms should not inadvertently mislead anyone into believing that Hiram Johnson and his reformers long ago enacted a prohibition against endorsements in nonpartisan elections. The reformers were not that out of touch with our Constitution. To the contrary, political parties were free to make endorsements in nonpartisan races in the period following the Johnson reforms, right up until 1986. Only then did the voters adopt the no-endorsement

> rule . . . . Until the adoption of the initiative measure in 1986, political parties were free to, and did, endorse in numerous nonpartisan elections. . . . And prior to 1986, few thought that the political process was in any great danger as a result. Thus, the historical events of the early 1900's cannot provide the basis for limiting the free speech rights of today's California Democrats, Republicans, and minor party members. Nor can the limitations of that speech be deemed necessary to the proper functioning of the nonpartisan election system. In reaching these conclusions, I note that nowhere in the record is there a whit of evidence that party endorsements in nonpartisan elections ever, even on a single occasion, led to corruption or evil of any kind - almost eighty years of endorsements in nonpartisan races and not a single example of a public official being unduly or improperly influenced.

Geary, supra, (Conc. Opinion of Reinhardt, J.), Petitioners' Appendix A, at pp. 14-15, footnotes omitted.

> Former court of appeal justice Winslow Christian's testimony simply presents one experienced individual's policy views on the subject of partisan endorsements in judicial elections. Certainly, those views can no more carry the day for an unconstitutional measure than can the popular vote. In any event, Mr. Christian's statement, like the rest of appellants' case, fails to offer a single fact, pro or con, relating to the making of a partisan endorsement, or its subsequent effect, in a nonpartisan race in California.

Id., at A-15, fn. 5

Since petitioners have failed to offer "a whit of evidence that party endorsements in non-partisan races ever, on even a single occasion, led to corruption or evil of any kind" (Geary, supra, (Conc. Opn. of Reinhardt, J.), Petitioners' Appendix A, p. 15), their writ petition raises no substantial question warranting review by this court.

III. THE ENDORSEMENT BAN CANNOT BE DEFENDED AS A MEASURE RELATING TO THE "STRUCTURE" OF LOCAL GOVERNMENT

Petitioners claim that California's interest in determining the "structure" of local government is, itself, a compelling state interest sufficient to override the free speech rights of political parties - despite the absence of any evidence in the record that political party endorsements ever - even in a single instance - led to corruption or evil of any kind during the period between 1913 and 1986.

In support of this claim, petitioners cite Article IV, Section 4 of the United States Constitution - the so-called "Republican Government Clause."

The claim that a State's power to determine the structure of local government could allow it to impair rights guaranteed to citizens by the United States Constitution has been considered and rejected by this Court on many occasions. See Gomillion v. Lightfoot (1960) 364 U.S. 339, 342, 344-345; Baker v. Carr (1962) 369 U.S. 186, 230; Gray v. Sanders (1963) 372 U.S. 368, 379, 381; Avery v. Midland County (1968) 390 U.S. 474, 480.

As this Court stated in Gomillion, supra, at p. 347:

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insultation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Petitioners' reliance on the "Republican Government Clause" runs counter to consistent rulings by this court to the effect that said provision is not judicially enforcable. See Baker v. Carr, supra.

The Court of Appeals correctly rejected petitioners' "structural" arguments:

> We are not unmindful that "the Constitution grants to the States a broad power /to regulate Congressional elections under/ Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." . . . But as the Supreme Court has emphasized, the state's power to protect the integrity of its electoral processes "does not justify, without more, the abridgement of fundamental rights, such as the right to vote . . ., or, as here, the freedom of political association." . . .

Geary, supra, Petitioners' Appendix A, p. 9.

> That is not to say that the people of California do not have the right to use a system of nonpartisan elections for filling local and judicial offices. No one quarrels with that right. But the people of California may not suppress free speech on the excuse that they are merely determining the method by which candidates will be elected. For nearly eighty years, California's local and judicial elections have been "nonpartisan." Traditionally, and as California has applied the term, a nonpartisan election means that the candidates who appear on the general-election ballot are not selected by political parties. . . .
>
> California my continue to hold elections that are nonpartisan in the traditional sense. But there is all the difference in the world between refusing to delegate to political parties the decision as to which candidates appear on the general-election ballot and prohibiting political party organizations from announcing their views on the merits of candidates seeking public office. The latter directly

infringes on the right of free speech.
. . .

Geary, supra, (Conc. opn. of Reinhardt, J.), Petitioners' Appendix A, at p. 13.

IV. THE RIGHT OF POLITICAL PARTIES TO MAKE ENDORSEMENTS IS NOT DIMINISHED BY THE STATE'S ACTION IN CONFERRING CERTAIN BENEFITS ON BALLOT-QUALIFIED PARTIES

Petitioners claim that because California confers certain benefits on ballot-qualified political parties - such as free voter registration lists and the right to nominate candidates for most state offices - the state has a greater power to restrict political party speech in elections than would otherwise be the case.

Such contention runs counter to uniform holdings by this court to the effect that acceptance of government-conferred benefits cannot be used as a pretext for infringement of constitutional rights. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or the placing of conditions upon a benefit or

privilege." Sherbert v. Verner (1963) 374 U.S. 398, 404.

Petitioners' suggestion that Austin v. Michigan Chamber of Commerce (1990) __ U.S. __ /110 S.Ct. 1391/ has, somehow, changed the law is erroneous.

Austin and other cases upholding restrictions on corporate political spending are not premised on a theory that corporations diminish their entitlement to First Amendment rights by accepting state-conferred benefits such as limited liability.

Rather as this Court stated in Federal Election Commission v. Massachusetts Citizens For Life ("MCLF") (1986) 479 U.S. 238, 259:

"Regulation of corporate political activity . . . has reflected concern not about use of the corporate form per se, but about the potential of unfair deployment of wealth for political purposes."

> Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. Political "free

trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. . . . The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no relection of the power of its ideas.

> By requiring that corporate indepedendent expenditures be financed through a political committee expressly established to engage in campaign spending, /federal law/ seeks to prevent this threat to the political marketplace. The resources available to this fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee. . . .

Id., at p. 259.

Such rationale is entirely absent in the case of political parties. A political party, unlike a business corporation is "formed to disseminate political ideas, not to amass capital. The resources it has available are not the function of its success in the economic marketplace, but its popularity in the political marketplace," Ibid.

Furthermore, petitioners fail to recognize the narrow scope of decisions by this Court upholding restrictions on corporate political spending: All of the laws upheld have prohibited only campaign spending from the corporate general treasury, and have permitted corporate campaign contributions and campaign expenditures from separate political action funds. See MCFL, supra, 479 U.S. at p. 259; Austin, supra, 110 S.Ct. at p. 1398.

California Constitution, Article II, Section 6(b) has no such saving grace: It imposes a blanket ban on all advocacy by political parties in support or opposition to any candidate for local, school, or judicial office!

The Court of Appeals well understood these points in disposing of petitioners' arguments concerning Austin, supra:

> As support the state cites Supreme Court cases upholding limits on campaign contributions and spending, contending that political party endorsements create the same risks of corruption that the Court previously has determined justify governmental regulation of election spending. The analogy is flawed. In its most recent pronouncement in this area,

Austin . . ., the Court upheld a provision of the Michigan Campaign Finance Act prohibiting corporations from using general treasury funds for independent expenditures in connection with state candidate elections. In its defense Michigan contended that the unique legal and economic characteristics of corporations necessitated some regulation of their political expenditures in order to avoid corruption or the appearance of corruption. . . . Affirming that, in previous cases, "/w/e . . . have recognized that 'the compelling governmental interest in preventing corruption support/s/ the restriction of the influence of political war chests funneled through the corporate form,'" . . ., the Court found the Michigan statutory provision a legitimate check upon "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the /state-conferred/ corporate form and that have little or no correlation to the public's support for the corporation's political ideas." . . .

The corruption the Court found properly addressed by the Michigan statute was not of the kind decried by California here. Under the definition applied in past cases, "/c/orruption is a subversion of the political process" whereby "/e/lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." . . . "The halmark of corruption is the financial quid pro quo: dollars for political favors." . . .

By contrast, the Court explicitly has excluded from its definition the kind of conduct California seeks to prevent with § 6(b): "/t/he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political

> messages . . . can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." . . . The rationale underlying "the long history of regulation of corporate political activity" thus simply is not available as a justification for the complete suppression of speech by political parties, regardless of whether the elections in question are partisan or nonpartisan in nature. . . .
>
> . . . . . .
>
> Even in the campaign contribution and expenditure cases appellants cite as support for their position, the Supreme Court consistently has emphasized the limited nature of the restrictions it has upheld and the availability of alternative avenues of expressions for the affected speakers. . . .
>
> . . . . . .
>
> In Austin, for exampale, the Court found the Michigan enactment at issue to be "precisely targeted" to achieve its aims because it "does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent expenditures through separate segregated funds." . . .

Geary, supra, Petitioner's Appendix A, pp. 4-5, 7, footnotes omitted, emphasis in original.

The Court of Appeals decision is fully consistent with Austin and does not warrant review.

V. THE HATCH ACT CASES PROVIDE NO BASIS FOR UPHOLDING RESTRICTIONS ON POLITICAL SPEECH BY INDEPENDENT, NONGOVERNMENTAL ENTITIES SUCH AS POLITICAL PARTIES

Petitioners suggest that California's political party endorsement ban may be upheld by analogy to cases sustaining restrictions on partisan activities by civil servants.

This analogy is flawed, for "the constitutionality of /such/ restriction/s/ is grounded in the Government's substantial and important interest in ensuring effective job performance by its own employees." Federal Communications Commission v. League of Woman Voters (1984) 468 U.S. 364, 401, fn. 27.

All attempts to apply such reasoning to support restrictions on political advocacy by persons or "independent, nongovernmental entities rather than . . . the Government's own employees" (League of Woman Voters, supra, at p. 401, fn. 27) have been consistently rejected. See League of Woman Voters, supra (invalidating ban on editorials by noncommercial educational broadcasters); Wood v. Georgia (1962) 370 U.S. 375,

395-395, fn. 21 (rejecting argument that speech of an elected public official, as opposed to a civil servant, could be restricted under rationale of Hatch Act cases); Bullfrog Films v. Wick (9th Cir. 1988) 847 F.2d 502 (invalidating restrictions on speech of film makers, film producers, and film distributors).

Finally, in upholding the Hatch Act, this Court has noted that "these restrictions evolved over a century of governmental experience with less restrictive alternatives that proved to be inadequate to maintain the effective operation of the government." League of Woman Voters , supra, at p. 401, fn. 27.

In the instant case "nowhere in the record is there a whit of evidence that party endorsements in nonpartisan elections ever, even on a single occasion, led to corruption or evil of any kind - almost eighty years of endorsements in nonpartisan races and not a single example of a public official being unduly or improperly influenced." Geary, supra, (Conc. opn. of Reinhardt, J.) , Petitioners' Appendix A, p. 15.

Thus, as in League of Woman Voters - but unlike the Hatch Act cases - the political party endorsement ban "is not grounded in any prior governmental experience with less restrictive means." Id., at p. 401, fn. 27.

CONCLUSION

This case presents no conflict in decisions. Moreover, no substantial federal question warranting review by this Court is presented, since the decision of the Court of Appeals herein is totally consistent with prior decisions of this Court. The Petition should be denied.

Respectfully submitted,

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